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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re W.K., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

W.K.,

Defendant and Appellant.

D053424

(Super. Ct. No. J193597)

APPEAL from a judgment of the Superior Court of San Diego County, Lawrence Kapiloff, Judge. Affirmed in part, reversed in part.

The juvenile court made true findings that W.K. committed two counts of aggravated assault (Pen. Code,¹ § 245, subd. (a)(1)) (counts 1 & 2); one count of battery (§ 243, subd. (d)) (count 3); and one count of resisting arrest (§ 148, subd. (a)(1))

¹ All further statutory references are to the Penal Code.

(count 5). As to counts 1 and 2, the juvenile court also made a true finding that W.K. personally inflicted great bodily injury within the meaning of section 1192.7, subdivision (c)(8) and section 12022.7, subdivision (a). W.K. was committed to the California Department Corrections and Rehabilitation, Division of Juvenile Justice, for a term not to exceed 10 years.

W.K. argues (1) insufficient evidence supports a finding that he was involved in the incident at issue; and (2) the true finding on one of two aggravated assault counts should be reversed because both counts were based on the same criminal act. We conclude that substantial evidence supports the juvenile court's true findings. However, we agree, as does the Attorney General, that one of the two aggravated assault counts must be reversed because it is duplicative of the other aggravated assault count.

I

FACTUAL AND PROCEDURAL BACKGROUND

On March 28, 2008, at approximately 4:00 p.m., while at a park in San Diego, high school student Adrian Carmichael was confronted by two individuals he described as "Africans."² When Carmichael saw that one of the individuals had a baseball bat, he ran away. The two individuals pursued Carmichael, and the individual with the bat hit him in the back of the head several times. Carmichael was also kicked and punched during the assault and he heard the assailants yelling at him. After the two individuals

² At the jurisdictional hearing, Carmichael clarified that by "Africans" he meant people who were born in Africa.

fled, Carmichael was transported to the hospital and required six stitches and 12 staples to repair the injury to the back of his head. Carmichael had a blood alcohol level of .24 when he arrived at the hospital after the assault.

In a photographic lineup, and later at the jurisdictional hearing, Carmichael identified W.K. as the individual with the baseball bat. According to Carmichael, he did not know W.K. before the assault.

On May 5, 2008, police officers arrested W.K. at his house. W.K. was verbally abusive during the arrest, lunged at the arresting officer and resisted being led out of the house.

A petition was filed charging W.K. with two counts of aggravated assault (§ 245, subd. (a)(1)) (counts 1 & 2); one count of battery (§ 243, subd. (d)) (count 3); one count of possession of a billy (§ 12020, subd. (a)(1)) (count 4); and one count of resisting arrest (§ 148, subd. (a)(1)) (count 5). As to counts 1 and 2, the petition also alleged that W.K. personally inflicted great bodily injury within the meaning of sections 1192.7, subdivision (c)(8) and 12022.7, subdivision (a).

At the jurisdictional hearing, W.K. presented an alibi-based defense. Relying on his own testimony and that of a witness, he claimed that on the afternoon of the incident he was in La Mesa picking up his younger siblings.

The trial court made a true finding as to counts 1 and 2 (including the allegation that W.K. personally inflicted great bodily injury), count 3, and count 5. It dismissed the petition as to count 4. Setting count 2 as the primary count, the juvenile court committed W.K. to the Division of Juvenile Justice for a term not to exceed 10 years.

II

DISCUSSION

A. *Substantial Evidence Supports the Juvenile Court's True Findings*

W.K. contends that insufficient evidence supports the juvenile court's implied finding that he was one of two individuals who attacked Carmichael.

We apply a substantial evidence standard of review to assess the sufficiency of the evidence. "In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) The same standard of review applies to juvenile court proceedings. (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1371.)

W.K. argues that Carmichael's identification of W.K. does not provide substantial evidence for the juvenile court's true finding because it was "inherently improbable."

(See *People v. Barnes* (1986) 42 Cal.3d 284, 306 [" ' "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category.

[Citation.] To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions" ' "].)

W.K. argues that Carmichael's identification of W.K. was inherently improbable because

during the jurisdictional hearing Carmichael "contradicted his claim that he didn't know who assaulted him." W.K. argues that if Carmichael in fact *did* know him before the assault, "it is reasonable to conclude that [Carmichael] had some sort of grudge against [W.K.]" and thus falsely implicated him by identifying him in the photographic lineup.

The testimony that W.K. relies on does not establish that Carmichael's identification of him as the assailant was inherently improbable. Indeed, as we will explain, it does not even establish the basic factual premise for W.K.'s argument, namely, that Carmichael knew W.K. before the assault.

To attempt to establish that Carmichael knew W.K. before the assault, W.K. first points out that during the jurisdictional hearing, Carmichael described the individuals who attacked him as native Africans. W.K. argues that if Carmichael did not know W.K. at the time of the attack, he could not have identified him as a native African.³ Specifically, W.K. argues that Carmichael "had no way of knowing that a group of blacks who approached him were native born Africans, unless he actually kn[e]w who the people were." We reject this argument. Carmichael may have known his assailants were native Africans because of their speech or some other characteristic such as their clothing. W.K.'s attorney did not ask Carmichael why he believed that his attackers were native Africans and thus did not negate the possibility that the identification was based on speech or some other characteristic. Because reasonable explanations exist for

³ Probation department documents in the record state that W.K.'s birthplace is Egypt or Sudan.

Carmichael's identification of his assailants as native Africans even though he did not know them, the juvenile court was not required to conclude that Carmichael in fact did know W.K. prior to the assault.

W.K. also attempts to establish that Carmichael knew W.K. before the assault by focusing on Carmichael's testimony concerning a conversation with W.K.'s cousin Grace. The prosecutor asked Carmichael, "You didn't talk to his cousin, Grace, about this?" Carmichael answered, "When I was going to school one day, and I walked straight past Grace, and I heard her talking to somebody else about what happened like she was there. Then she told me, 'I will get my cousin to hit you with the bat again.' " W.K. argues, "[I]f [Carmichael] did not know [W.K.], how would he know that Grace was [W.K.]'s cousin."

Carmichael's testimony about his conversation with Grace does not establish that Carmichael knew W.K. prior to the assault. The testimony establishes only that Grace gave Carmichael information that implicated her "cousin" in the assault. It does not establish that at the time Grace made the statement Carmichael knew that W.K. was the cousin to whom Grace was referring. Although Carmichael apparently knew by the time of the jurisdictional hearing that Grace and W.K. were cousins, nothing in the record establishes that Carmichael knew of W.K., or Grace's relationship to W.K., at the time of the assault.

In addition, even if W.K. did point to evidence that Carmichael knew him before the assault, his argument would fail for a second reason. W.K.'s argument for the inherent improbability of Carmichael's identification of him depends on two separate facts: (1) that Carmichael knew him before the assault; and (2) that Carmichael held a

grudge against him. W.K. has pointed to no evidence to establish this second fact. He identifies nothing in the record to suggest that Carmichael held a grudge against him and thus falsely implicated him for that reason.

In short, the evidence presented at the jurisdictional hearing did not establish that Carmichael knew W.K. before the assault or that Carmichael falsely implicated W.K. in the assault because he held a grudge against him. Accordingly, W.K. has not established the factual predicate for his argument that Carmichael's identification of him was inherently improbable. Given the evidence presented, the juvenile court was within its discretion as the trier of fact to make a positive determination about Carmichael's credibility and to rely on that testimony for its finding that W.K. was the person who assaulted Carmichael. (*People v. Breault* (1990) 223 Cal.App.3d 125, 140 (*Breault*) [" 'any conflict or contradiction in the evidence, or any inconsistency in the testimony of witnesses must be resolved by the trier of fact who is the sole judge of the credibility of the witnesses' "].)⁴

B. *The True Finding on One of the Aggravated Assault Convictions Must Be Reversed*

We next consider W.K.'s contention that the true finding on one of the aggravated assault counts should be reversed because the counts are identical and arose from the same incident.

⁴ W.K. also briefly suggests that Carmichael's identification of W.K. lacks credibility because Carmichael was under the influence of alcohol at the time of the incident. However, it is not the role of the appellate court to reassess the credibility determinations made by the trier of fact. (*Breault, supra*, 223 Cal.App.3d at p. 140.)

The petition charged W.K. with two counts of aggravated assault (counts 1 & 2) without specifying any factual distinction between the two counts. At the jurisdictional hearing, the parties did not identify any separate conduct that would give rise to two counts of aggravated assault rather than one. In setting forth its ruling at the conclusion of the jurisdictional hearing, the juvenile court found both counts 1 and 2 to be true. It stated, "I am finding Count 2 to be the major count, and obviously Count 1 and Count 3 [the battery count] are subsumed in Count 2." After W.K.'s attorney asked for clarification as to whether the "court is finding that there were two separate incidents," the juvenile court stated, "No, I'm finding one incident. . . . In other words, they are just different ways."

It is axiomatic that, a "defendant may not be subjected to multiple convictions based upon a single, indivisible act or omission in violation of a single statute." (*People v. Gardner* (1979) 90 Cal.App.3d 42, 47-48, italics omitted; see also *People v. Lewis* (1978) 77 Cal.App.3d 455, 461 ["a defendant may not be subjected to multiple convictions for only one criminal act"].) Related to this concept is the rule that a "defendant . . . cannot be convicted of both an offense and a lesser offense necessarily included within that offense, based upon his or her commission of the identical act." (*People v. Sanchez* (2001) 24 Cal.4th 983, 987.)

Here, there is no dispute that the two counts of aggravated assault were based on the commission of identical acts. The juvenile court found that the two counts were based on the same incident, and the attorney general concedes that "the record contains no evidentiary basis upon which to hold [W.K.] criminally liable for two separate acts of

aggravated assault with a [great bodily injury] enhancement." Indeed, the Attorney General concedes that count 1 should be reversed.

Accordingly, because a defendant may not be subjected to multiple convictions for violating the same statutory provision based on the same act, we reverse the juvenile court's true finding as to count 1.

DISPOSITION

The juvenile court's true finding as to count 1 is reversed. In all other respects we affirm.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.